

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF HAWAII

3 A.B., by her parents and) CV 18-00477 LEK-RT
 4 next friends, C.B. and D.B.,)
 and T.T., by her parents and) Honolulu, Hawaii
 5 next friends, K.T. and S.T.,) April 5, 2019
)
 6 Plaintiffs,) (22-1) Motion to Dismiss
) Plaintiffs A.B., by her
 7 vs.) parents and next friends,
) C.B. and D.B., and T.T., by
 8 HAWAII STATE DEPARTMENT OF) her parents and next
 EDUCATION and OAHU) friends, K.T. and S.T.'s
 9 INTERSCHOLASTIC ASSOCIATION,) Complaint for Declaratory
) and Injunctive Relief
 10 Defendants.)
)
 11 _____

12 TRANSCRIPT OF PROCEEDINGS
 13 BEFORE THE HONORABLE LESLIE E. KOBAYASHI
 14 UNITED STATES DISTRICT JUDGE

15 APPEARANCES:

16 For the Plaintiffs: JONGWOOK PHILIP KIM
 17 MATEO CABALLERO
 18 ACLU of Hawai'i
 PO Box 3410
 Honolulu, Hawaii 96801

19 For the Defendant JOHN M. CREGOR, JR., Deputy
 20 Hawaii State Department Office of the Attorney General-Hawaii
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21
 22 For the Defendant LYLE S. HOSODA
 23 Oahu Interscholastic LAUREN M. NAKAMURA
 Association: Hosoda & Bonner
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UNITED STATES DISTRICT COURT

1 APPEARANCES CONTINUED:

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21 Official Court Reporter: Debra Read, CSR CRR RMR RDR
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25 Proceedings recorded by machine shorthand, transcript produced
with computer-aided transcription (CAT).

1 FRIDAY, APRIL 5, 2019 9:45 A.M.

THE COURTROOM MANAGER: Civil 18-00477 LEK-RT, A.B.,
by her parents and next friend, C.B. and D.B., and T.T. by her
parents and next friends, K.T. and S.T. versus the Hawaii
Department of Education and the Oahu Interscholastic
Association.

7 This case has been called for hearing on Defendant Oahu
8 Interscholastic Association's motion to dismiss plaintiffs'
9 complaint.

10 Counsel, please make your appearances for the record.

11 Please speak into a microphone.

12 MR. KIM: Wookie Kim with the ACLU of Hawaii on
13 behalf of plaintiffs.

14 MR. CABALLERO: Mateo Caballero with the ACLU of
15 Hawaii.

16 THE COURT: All right. Good morning to you both.

17 Mr. Hosoda.

18 MR. HOSODA: Good morning, Your Honor.

19 Lyle Hosoda and Lauren Nakamura appearing on behalf of
20 the defendant Oahu Interscholastic Association.

21 THE COURT: All right. Good morning to you both.

22 MR. CREGOR: And good morning, Your Honor.

23 John Cregor, Deputy Attorney General, appearing for the
24 Department of Education, defendant

25 THE COURT: All right. Good morning, Mr. Cregor.

1 So you folks know the case much better than I do. I'm
2 happy to hear whatever your arguments are. I'll give you a
3 preliminary inclination of the court and my preliminary
4 inclination is to deny the motion.

5 Under *Iqbal v. Twombly* -- I'm sorry -- *Ashcroft v. Iqbal*
6 and *Atlantic v. Twombly*, the plaintiff allegation must suggest
7 that the claim at least has a plausible chance of success. In
8 other words, their complaint must allege factual content that
9 allows the court to draw the reasonable inference that the
10 defendant is liable for the conduct alleged.

11 I have taken a look at the *Smith* case and where the
12 Supreme Court found that it has to be more than a passing
13 belief that federal funds were used to pay the association
14 fees. But here under the standard now that the court would
15 look at it on a motion to dismiss to assume that the facts as
16 alleged are true, the court therefore is compelled by
17 paragraph 13 to conclude that the DOE receives federal
18 financial assistance and is subject to the anti-discrimination
19 provisions of Title IX, and that in paragraph 16, "The OIA has
20 controlling authority over many aspects of the DOE's
21 interscholastic athletic programs, including athletic
22 facilities," et cetera, and most specifically the last sentence
23 which says, "The OIA indirectly receives federal financial
24 assistance," and therefore, "The OIA is subject to the
25 anti-discrimination provisions of Title X[sic]."

1 Further, I think at paragraph 5, the allegation is that
2 the OIA acts under the control of and in close coordination
3 with the DOE. While that doesn't outright say they receive
4 funds from OIA -- I mean, from the DOE -- I think putting all
5 of those paragraphs together, there's at least an argument or a
6 suggestion of at least a plausible chance of success. Of
7 course, discovery can be done to see if whether they receive,
8 in fact, any funding from the DOE.

9 All right. So that's the preliminary inclination. It is
10 an inclination; it's not my final decision.

11 So, Mr. Hosoda, I'll start with you, given my inclination
12 and that you filed the motion.

13 MR. HOSODA: Thank you, Your Honor. And I
14 appreciate the Court providing us with your inclination.

15 And with that, I don't have too much to add.

16 THE COURT: Okay.

17 MR. HOSODA: But in terms of context, I wanted to
18 just tell you how much of a privilege it is to stand before you
19 representing the OIA because this is my tenth year and it
20 really is a situation where since 1940, OIA has been in
21 existence, and now it is comprised of 30 schools that look and
22 oversee 19 sports.

23 Now back in the '40s and '50s and '60s, it was pretty
24 simple in terms of an equation because you had a limited amount
25 of schools and you had very limited issues 'cause you either

1 had the ILH and/or the OIA. But now the OIA is confronted with
2 many issues, charter schools, many different types of schools.
3 How do we get the student? Everybody, when I go to their
4 meetings when there are 30 principals, 30 athletic directors,
5 there's not an individual in there with less than 25 years of
6 experience and commitment, passionate commitment to the student
7 athletes.

8 So I want to assure Your Honor that these individuals that
9 make up the OIA are definitely committed to the exact same
10 thing that ACLU is alleging in this case which is we're
11 committed to the student athlete and fairness for all.

12 They are really passionate about that, and I say it's
13 privileged because I give of my time because of the student
14 athlete and all it did for all of us when we were growing up.

15 So these issues that come up with this commitment,
16 constantly new issues, right? We've had eligibility
17 challenges. We've -- you know, how do you have fairness to
18 everybody? It's very hard. And many times it boils down to
19 politics and money. We can only do the best we can with the
20 resources that we have, and I want to tell you that our
21 individuals at our association are definitely committed.

22 As to this specific motion, we found the *Smith* case, and
23 because the NCAA is the collegiate athletic association, we
24 thought that it was worthy of bringing that issue before the
25 Court. I can understand the Court's inclination -- and it is

1 troublesome for us because we have a situation where all of the
2 members, athletic directors, and principals, are all on DOE
3 salary. All of the playing facilities that we have, all of the
4 facilities and accommodations that we have are largely almost
5 all DOE which receive -- it's undisputed that the DOE receives
6 funds. But the other aspect to this is that the OIA does not
7 receive any federal funding directly and don't have that
8 contract.

9 So for those reasons, I can see where there's a
10 troublesome issue, and I -- you know, I appreciate the Court's
11 inclination and we'll go along with that. But I just want to
12 say that I do think that it was not a motion that was not worth
13 bringing --

14 THE COURT: No, no, I don't think it's a frivolous
15 motion. I think the *Smith* case is pretty clear with regard to
16 that. It's just under a motion to dismiss standard where I
17 assume all of the allegation is true and they just have to make
18 a plausible claim of success, I think it's sufficient here for
19 that.

20 Now, whether it can withstand a motion for summary
21 judgment, whether the evidence in the discovery will show that
22 OIA is an agent or subunit of DOE, I guess that's yet to be
23 seen.

24 MR. HOSODA: Thank you, Your Honor.

25 THE COURT: But I appreciate it. Thank you.

1 MR. HOSODA: Thank you.

2 THE COURT: Okay. Mr. Kim, will you be arguing?

3 MR. KIM: May it please the Court.

4 We totally -- we completely agree with your preliminary
5 inclination. The question presented before the Court today is
6 whether -- based on the allegations in the complaint, whether
7 it is plausible that the OIA is subject to Title IX. And as
8 the Court has already pointed to, there are numerous paragraphs
9 that specifically touch on the question of receiving federal
10 financial assistance.

11 And so at this stage, it's inappropriate, we believe, to
12 construe all of these allegations in the complaint in the
13 opposite -- you know, in the OIA's favor, and so the Court
14 should deny the motion.

15 And I think if there are any questions that you have about
16 any of the specific bases that we've set forth in our
17 opposition brief, I'm more than happy to address those. But an
18 important point, I think it sounds like from counsel for OIA
19 that there's no dispute, and we're not alleging this either,
20 that the OIA does not directly receive federal funds. And so
21 really it comes down -- sorry -- as in directly contracted OIA,
22 between OIA and the federal government.

23 THE COURT: Right.

24 MR. KIM: And the question just becomes what is the
25 OIA's relationship with the DOE in other respects.

1 And our first argument is really that, you know, the OIA
2 is completely subsumed within the DOE. So in other words,
3 under the Civil Rights Restoration Act and *NCAA v. Smith*, which
4 both acknowledge that Title IX applies institution-wide, if the
5 DOE receives funding, then all of its programs, every -- every
6 single part of it also is subject to Title IX.

7 And so if the OIA is completely subsumed within the DOE,
8 then, obviously, naturally it must be subject to Title IX as
9 well.

10 The trickier question is more because we don't know at
11 this stage what the formal status of OIA is. We looked through
12 the corporate database. It is not incorporated in any form.
13 So -- and I think that is a significant allegation as well,
14 that the OIA is unincorporated. As the *Russo* case out
15 of -- I'm blanking on the specific district -- but the *Russo*
16 case emphasized when looking at one school and knowing that it
17 did not have separate corporate status, sort of in the same way
18 that we impute conflicts of interest to firms, if that one
19 school is subject to Title IX, it imputes to the entire system,
20 and that should hold here as well.

21 And the final point I'll make really is about indirect
22 funding. I think *NCAA v. Smith* makes very clear that indirect
23 funding is sufficient, and we've alleged that here. And as
24 even counsel for OIA has conceded, there's tons -- there is
25 tons of funding going from DOE to the OIA and that's through

1 the salaries. This is not a situation where there's just a
2 small sum of money that is funding the OIA, and we expect that
3 discovery will show all of this.

4 But again, that's not what we're deciding, or that's
5 not --

6 THE COURT: Right, and that wasn't alleged in the
7 complaint.

8 MR. KIM: Yes.

9 THE COURT: But you have to do discovery with regard
10 to that.

11 MR. KIM: Yes.

12 THE COURT: And so that probably will be, you know,
13 teed up for another day on a motion for summary judgment.

14 Where are you folks on discovery, though? Do you have a
15 discovery plan? Are you going to phase the discovery so that
16 you can focus on this OIA issue first?

17 Have you guys met with the magistrate judge? Do you need
18 assistance?

19 MR. KIM: We've -- discovery has begun. There has
20 not been any phasing. To be honest, we didn't expect the OIA
21 to raise this much of a fight about this issue about whether
22 it's subject to Title IX because, you know, I think if you look
23 at the big picture, it becomes very clear that there's just no
24 reasonable -- there's no reasonable basis or argument to say
25 that the OIA is not subject to Title IX.

1 THE COURT: Well, I mean, if the *Smith* case -- I
2 mean, the Supreme Court has held, you know, if there's this
3 sort of passing kind of relationship with federal funding, that
4 that's not enough -- you know, enough to say the NCAA, you
5 know, their dues are being paid by the school and the school
6 receives federal funding, so -- of course, it's different with
7 universities, even state universities, because they have a lot
8 of private donors. DOE does not. It either comes from state
9 funding or federal funding. I mean, there's some grants and
10 private -- but, you know, majority. So I think that's
11 different than universities.

12 But I think *Smith* stands for the proposition of you need
13 to show a direct correlation between -- not necessarily direct
14 funding -- but a direct correlation between the funded entity,
15 that is, the educational system, here DOE, or it's a
16 university, and the athletic association.

17 So if -- as you and Mr. Hosoda have indicated, you know,
18 all these athletic directors and coaches and so forth comprise
19 OIA and state employees presumably being paid by state funds
20 and federal funds.

21 But if they're serving as volunteers, then I don't know
22 that I can -- I'm just talking out loud now, I'm not making any
23 rulings -- I don't know that I can impute their salaries
24 necessarily to OIA -- to the OIA if they're serving as
25 volunteers. I don't know at this point. And maybe none of us

1 know right now on what basis they serve in the OIA and how much
2 of their salaries are comprised of federal funding as opposed
3 to state and so forth.

4 MR. KIM: Of course.

5 THE COURT: So that's the kind of stuff that you
6 guys have to do in discovery.

7 What I was asking about phasing is is that, you know, this
8 could be ripe for summary judgment, and if that's something
9 that you guys want to do then, you know, I would suggest you
10 sits down and either work it out among yourselves and have the
11 discovery based on that, 'cause there's no -- there's not going
12 to be any denial I think that the DOE receives federal funding,
13 okay? But this is certainly a threshold issue with regard to
14 OIA, you know, what is it, what is it comprised of, how is it
15 funded, if at all. I don't know. I don't know if it's a bunch
16 of volunteers. I don't know if they have insurance. I don't
17 know.

18 But all of these things I think would be important if
19 somebody files a motion for summary judgment, you know, based
20 on the Supreme Court's ruling in *Smith*. Has to be more than
21 sort of a passing relationship.

22 MR. KIM: So with respect to discovery, we've
23 actually been trying to depose the OIA for quite some time now.

24 THE COURT: Okay.

25 MR. KIM: But our understanding is that the OIA is

1 not willing to put up a designee because everyone is a DOE
2 employee. And so we're sort of in this weird situation.

3 THE COURT: Okay. Well, meet with Judge Trader. I
4 believe he's the magistrate judge with you folks.

5 MR. KIM: Yeah. And of course we have yet to, you
6 know, meet and confer explicitly about some of these issues.
7 But, you know, I think these will be resolved eventually.

8 THE COURT: Okay. Very good. All right. Thank
9 you.

10 Mr. Hosoda, I'll give you the last word.

11 MR. HOSODA: Thank you. I just can't let the record
12 stand. I think counsel inadvertently overspoke that I had
13 conceded that the OIA had received federal funding or federal
14 benefits, and I just can't leave that alone.

15 THE COURT: Right, right. I don't think that's what
16 the record -- I don't -- okay. But I took it to mean he was
17 saying that if they indirectly have received it, then they
18 would be under the ambit of Title IX, which is -- I think is
19 what the case law says. It's just we don't know at this point.

20 MR. HOSODA: Right. And the second point was with
21 respect to discovery, I was surprised to hear him say that
22 because I've been working very cooperatively with them, and the
23 depositions of the OIA are coming up, have been set. We have
24 been trying to schedule them for a while, mostly because of my
25 personal schedule. But we're fully cooperative and it is

1 happening.

2 THE COURT: Okay.

3 MR. HOSODA: We didn't talk about staging and I'm
4 not sure this one will be, you know, a summary judgment so that
5 it should be bifurcated or proceeded differently. So I think
6 we should just continue on with the discovery as we're going
7 along.

8 THE COURT: Very good. Have you guys had your
9 Rule 16 yet?

10 MR. HOSODA: We have.

11 THE COURT: So you have your deadlines and
12 everything.

13 MR. HOSODA: Thank you, Your Honor.

14 THE COURT: Okay. Thank you very much, counsel.

15 And the court denies the motion to dismiss and a written
16 order will be prepared regarding the same.

17 All right. I wish everyone a good day and a good weekend.

18 We are in recess. Thank you.

19 (Proceedings concluded at 10:01 A.M.)

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COURT REPORTER'S CERTIFICATE

I, DEBRA READ, Official Court Reporter, United States District Court, District of Hawaii, do hereby certify that pursuant to 28 U.S.C. §753 the foregoing is a complete, true, and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

DATED at Honolulu, Hawaii, April 22, 2019.

/s/ Debra Read

DEBRA READ, CSR CRR RMR RDR